



IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant: Robert Heiberger
Appl. No.: 09/237,687
Filed: January 26, 1999
Docket No.: 1750
Conf. No.: 7198
Title: **A FLUID CONTAINER CLOSURE MECHANISM WITH DETACHABLE VALVE ASSEMBLY**
Art Unit: 3752
Examiner: Christopher S. Kim
Action: **TRANSMITTAL OF APPEAL BRIEF IN TRIPLICATE**
Date: November 13, 2003

TO: Mail Stop Appeal Brief - Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

In reference to the above-identified patent application, please find enclosed the Appeal Brief (in triplicate) and check no. 18097 in the amount of \$165.00 for the filing fee associated with this brief. The Commissioner is hereby authorized to charge any deficiency in the payment of the required fee(s) or credit any overpayment to Deposit Account No. 13-1940.

Respectfully Submitted,

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CERTIFICATE OF EXPRESS MAILING UNDER 37 C.F.R. 1.10

I hereby certify that the attached documents including a **TRANSMITTAL OF APPEAL BRIEF IN TRIPLICATE AND CHECK NO. 18097 IN THE AMOUNT OF \$165.00 FOR THE FILING FEE OF THE BRIEF** are being deposited with the United States Postal Service as EXPRESS MAIL, label number EU 013021962 US for delivery in an envelope addressed to Mail Stop Appeal Briefs - Patents, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450, on this 3rd day of November, 2003.

Marcie F. King
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Sir:

This Appeal is from the Final Rejection of claims 1, 5, 7 and 9 in the above-referenced application. Claims 34 and 35 have been allowed. A Notice of Appeal was mailed by Appellant on August 11, 2003, with a certification pursuant to 37 C.F.R. §1.8, and was received by the Patent Office on August 14, 2003. Accordingly, the Appeal Brief in this matter was due October 14, 2003, however, filed concurrently herewith is a one (1) month extension of time so that the Appeal Brief is due November 14, 2003.

In compliance with 37 C.F.R. §1.192, Appellants submit the following as his Appeal Brief in this matter through the undersigned counsel.

I. REAL PARTY IN INTEREST

The real party in interest for purposes of this appeal is Robert Heiberger, residing at 2329 13th Street, Boulder, Colorado 80304.

II. RELATED APPEALS AND INTERFERENCES

This is the second time that Applicant has appealed the rejection of his application. Applicant believes that the Decision on Appeal entered in Appeal No. 2002-0704 dated October 27, 2002 by the Board of Patent Appeals and Interferences has a bearing on the Board's decision to be rendered in this appeal.

III. STATEMENT OF STATUS OF CLAIMS IN THE APPLICATION

This Application currently includes a total of six (6) claims. In the Office Action of February 10, 2003, the Examiner finally rejected claims 1, 5, 7 and 9; claims 34 and 35 were allowed. A copy of appealed claims 1, 5, 7, and 9, which are the subject of this appeal, is attached hereto as Appendix A.

Claims 1, 5, 7 and 9 were rejected under 35 U.S.C. §102(b) as being anticipated by U.S. Patent No. 5,145,094 to Perlmutter. Claims 34 and 35 were deemed allowable over the prior art of record.

IV. STATEMENT OF STATUS OF AMENDMENTS FILED SUBSEQUENT TO FINAL REJECTION

The Examiner's Office Action made final, dated February 10, 2003 was in response to Appellant's Amendment of December 23, 2002. Appellant filed its Notice of Appeal on August 11, 2001 which was docketed on August 14, 2003. No amendments were filed subsequent to the final rejection.

V. SUMMARY OF THE INVENTION

Applicant's invention comprises a closure for a fluid container that is adapted to hold a product for dispensing. For example, a fluid container 10 includes a receptacle

portion 12 and a cap portion 14 that is provided with a reclosable, pop-up type fluid discharge valve assembly 16. (7:14-18). The cap member 12 has a duct in the form of a sleeve 18 that includes an upper portion 22 and a lower portion 24. (Figure 8; 8:14-19) This sleeve 18 defines an outlet passage for fluid discharge from their receptacle 12. (8:19-21). The lower sleeve portion 24 includes guide member 32, 34 which form at least one slot 36 therebetween. (8:25-9:2)

A valve body 30 (Figures 6 and 7) is disposed for longitudinal movement within sleeve 18 between an open position (Figure 9) and a closed position (Figure 8). (13: 5-7) The valve body 30 has at least one, but preferably two ears 70 that project radially outwardly from the valve body 30 to form a stop member 66, 68 that is received in the slot 36 between guide members 32 and 34. (10:13-19). The ears are removable out of the slot 36 to allow disassembly of the valve body from the sleeve for cleaning; this is possible since valve body 30 is made from elastic material that can be deformed under certain circumstances. (13:3-24). The stop members not only limit the longitudinal movement of the valve body 30 within the sleeve 18 but also restrict rotational movement of the valve body 30 in sleeve 18. (10:24-11:1). The valve body 30 includes an open inner end 50 that communicates with the interior of the container 10 to enable the valve body 30 to be radially outwardly deformed by internal pressure within the container 10 to increase the sealing capacity of the valve body 30 in conjunction with increases in the internal pressure of the container. (12:21-13:2). The ears 70 that define the stop members 66, 68 have a chamfered surface in the form of a wedge 82 with the stop members 66, 68 being disposed on the valve body 30 for limiting

longitudinal movement of the valve body 30 within the sleeve between the open and closed positions. (Figure 11; 11:1-7;10:15-11:7).

VI. STATEMENT OF ISSUES ON APPEAL

The following issue is believed by Appellant to be important for purposes of this Appeal:

A. Does Perlmutter teach an ear that will act against a guide member to deform a valve body and become disengage from a slot thereby to allow removal of the valve body from a sleeve upon longitudinal movement of the valve body relative to the sleeve?

VII. GROUPING OF THE CLAIMS

Appellant believes that the claims are grouped such that if claim 1 falls, then claims 5, 7, and 9 should also fall.

VIII. LEGAL ARGUMENT

This is the second appeal in this case from a final rejection entered by the Examiner. The first appeal, Appeal No. 2002-0704 (hereinafter the "First Appeal"), was directed to claims 1-5, 7, 9, 33 and 34; claim 35 had been allowed. Claims 1-5, 7, 9 and 33 had been rejected over the art under 35 U.S.C. § 103. Claims 2, 4, 5 and 34 had been rejected under 35 U.S.C. § 112. The Board in its Decision On Appeal, a copy of which is attached hereto as Exhibit B for convenience, affirmed the rejection of claims 2, 4 and 5 under 35 U.S.C. § 112, but reversed the rejection of claim 34. The rejection of claims 1-5, 7, 9 and 33 was affirmed, but under new grounds.

For purposes of the present appeal, it is helpful to set forth the language of relevant claim 1 as it existed in the First Appeal. That language follows:

1. A closure for a container that is adapted to hold a product for dispensing, comprising:

(a) a cap member mountable to a container, said cap member having a product outlet passage and a sleeve defining said outlet passage that includes a guide member and a longitudinal slot along said guide member; and

(b) a valve body disposed for longitudinal movement within said sleeve between an open position to permit flow of product through said passage from said container and a closed position to prevent flow of product through said passage, said valve body having an ear projecting radially outwardly, said ear received in said slot during use and removable out of said slot to allow removal of said valve body from said sleeve.

In reviewing claim 1, the Board considered the two prior art references cited by the Examiner, namely, U.S. Patent No. 3,201,013 to Porter et al and U.S. Patent No. 5,145,094 to Perlmutter, and extensively analyzed their respective teachings. The Board concluded that there were differences between claim 1 and Porter. Decision, Exhibit B, at page 14.

However, the Board determined that there was no difference in the recitations of claim 1 and Perlmutter, stating:

The only possible distinction between Perlmutter and claim 1 is the limitation that the radially outwardly projecting ear of the valve body is removable out of the slot to allow removal of the valve body from the sleeve of the cap member. It is our view that this limitation is inherently met by Perlmutter. ...

In that regard, it is our determination that the space circumscribed by skirt 14 of the cap member shown in Figure 1 [of Perlmutter] would inherently permit a user to insert a tool to press the flanges 41 of the closure member together permitting the user to grab the end wall 29 of the closure member and remove the closure member 26 from the cap member 10. Thus, we do not agree with the appellant's position (brief, pp. 11-12) that Perlmutter's closure member 26 is not removable from the cap member [footnote omitted].

Decision, Exhibit B, at pp. 14-15.

Pursuant to 37 C.F.R. § 1.196(b), the Board allowed appellant two months to submit an appropriate amendment or to request a rehearing.

Accordingly, applicant/appellant timely filed an amendment wherein claims 2, 3, 4 and 33 were cancelled. Claim 1 was amended based on the guidelines articulated by the Board. Specifically claim 1 was amended as follows:

1. (Twice Amended) A closure for a container that is adapted to hold a product for dispensing, comprising:

(a) a cap member mountable to a container, said cap member having a product outlet passage and a sleeve defining said outlet passage that includes a guide member and a longitudinal slot along said guide member; and

(b) a valve body disposed for longitudinal movement within said sleeve between an open position to permit flow of product through said passage from said container and a closed position to prevent flow of product through said passage, said valve body constructed of a stiff yet resiliently bendable material and having an ear projecting radially outwardly and received in said slot during use to define a stop member for limiting movement of said valve body within said sleeve between the open and closed positions, said valve body rotatable within said sleeve with said ear configured such that, upon rotation, said ear will act against said guide member to deform said valve body and become disengaged from the slot thereby to allow removal of said valve body from said sleeve upon longitudinal movement of said valve body relative to said sleeve. (emphasis added)

Despite this amendment, the Examiner entered a new final rejection of claim 1 (and dependent claims 5, 7 and 9) as anticipated by Perlmutter under 35 U.S.C. §102(b). It is this rejection that is the basis of this second appeal.

A. Perlmutter fails to disclose an ear that will act against a guide member to deform a valve body and become disengage from a slot thereby to allow removal of the valve body from a sleeve upon longitudinal movement of the valve body relative to the sleeve?

To anticipate a claim under 35 U.S.C. §102(b), the reference must teach each

and every element of the claim. See, e.g., *Verdegaal Bros. v. Union Oil Co. of California*, 814 F.2d 628, 631, 2 USPQ2d 1051, 1053 (Fed. Cir. 1987) ("A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference."). That is, "[t]he identical invention must be shown in as complete detail as is contained in the . . . claim." *Richardson v. Suzuki Motor Co.*, 868 F.2d 1226, 1236, 9 USPQ2d 1913, 1920 (Fed. Cir. 1989). See also, *Hybritech, Inc. v. Monoclonal Antibodies, Inc.*, 802 F.2d 1367, 231 USPQ 81 (Fed. Cir. 1986) ("It is axiomatic that for prior art to anticipate under 102 it has to meet every element of the claimed invention."); *In re Bond*, 910 F.2d 831, 15 USPQ2d 1566 (Fed. Cir. 1990) ("For a prior art reference to anticipate in terms of 35 U.S.C. §102, every element of the claimed invention must be identically shown in a single reference.").

For purposes of this appeal, the important language of appealed claim 1 concerns the structure the ear that is on the valve body of the present invention. This ear is recited to reside in a slot that is along the guide member of the sleeve of the cap member during longitudinal movement to define a stop member for limiting movement of the valve body as it moves between the open and closed positions. The valve body is constructed of a stiff yet resiliently bendable material. Importantly, amended and appealed claim 1 recites a configuration for the ear. It projects radially outwardly and is "configured such that, upon rotation, said ear will act against said against said guide member to deform said valve body and become disengaged from the slot thereby to allow removal of said valve body from said sleeve upon longitudinal movement of said valve body relative to said sleeve."

The Examiner deems this to be a functional recitation. While appellant disagrees that it is functional due to the inclusion of the language regarding the configuration, so that the recitation is not merely to a result to be accomplished, this distinction is not critical to a determination of patentability. It is well settled that, even if functional, such recitations are to be fully considered. *Pac-Ten, Inc. v. Amerace Corp.*, 903 F.2d 796,901 (Fed. Cir. 1990); *In re Vanezia*, 530 F.2d 956 (CCPA 1976).

With regard to the Decision on Appeal in the First Appeal, appellant does not dispute the Board's reading of Perlmutter with respect to flanges 41 acting as the ears recited in former claim 1. That claim merely recited that the valve body had "an ear projecting radially outwardly, said ear received in said slot during use and removable out of said slot to allow removal of said valve body from said sleeve." The Board construed the teachings of Perlmutter and determined:

We conclude that the flanges 41 of the closure member are removable (i.e., have the capability of being removed) out of the slots defined by the arms 19 of the cap member thus allowing removal of the closure body form sleeve 16 and the cap member 10.

Decision on Appeal, p. 15.

But this is very different than having an ear configured to act against the guide member to deform to deform the valve body by such action and thereby cause the ear to become disengaged from the slot. Indeed, the Board in the First Appeal specifically interpreted the ability of the structure of Perlmutter on this very point of the removability of flange 41. As noted above, the Board held:

[I]t is our determination that the space circumscribed by skirt 14 of the cap member shown in Figure 1 [of Perlmutter] **would inherently permit a user to insert a tool to press the flanges 41 of the closure member together permitting the user to grab the end wall 29 of the closure**

member and remove the closure member 26 from the cap member 10.
(emphasis added)

Decision on Appeal, p. 15.

Despite the Board's clear interpretation of the inherency taught in the Perlmutter reference the Board, the Examiner on remand ignored the structural limitation inserted into claim 1 to distinguish over the inherent ability to use a tool to remove the closure member. Applicant/appellant recited that the ear itself was configured to cause the deformation without the need for a tool. The Examiner simply dismissed out-of-hand this limitation stating in essence that Perlmutter would allow this functional recitation. No reference was made to any disclosure in Perlmutter upon which reliance was made.

This is not surprising, however, for nowhere does Perlmutter even discuss removability of his unitary plastic body from the plastic cap member. The opinion that a tool could be used to effect removal of the body from the cap by mechanically deforming the cap with the tool, as found by the Board in the First Appeal, does not imply that the flanges themselves would act to cause deformation of the arms 19 upon recitation. Absent such explicit teaching in Perlmutter, appealed claim 1 should be allowed. This should be the result of this appeal whether the analysis is under 35 U.S.C. § 102 or under 35 U.S.C. § 103. Perlmutter simply does not describe this element as now recited and none of the art of record suggests such structure.

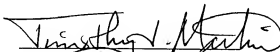
IX. CONCLUSION

The Examiner has failed to give proper weight to the structural and functional relationships now recited in claim 1. By ignoring such recitations, the Examiner has improperly rejected claim 1 over the Perlmutter reference when Perlmutter does not

anticipate all of the limitations set forth in claim 1. Therefore, Appellant believes the appealed claims contain allowable subject matter, and respectfully requests that the Board of Appeals reverse the Examiner's decision and grant allowance on claims 1, 5, 7 and 9.

Respectfully submitted,

TIMOTHY J. MARTIN, P.C.

A handwritten signature in black ink, appearing to read "Timothy J. Martin", written over a horizontal line.

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APPENDIX A

1. A closure for a container that is adapted to hold a product for dispensing, comprising:

(a) a cap member mountable to a container, said cap member having a product outlet passage and a sleeve defining said outlet passage that includes a guide member and a longitudinal slot along said guide member; and

(b) a valve body disposed for longitudinal movement within said sleeve between an open position to permit flow of product through said passage from said container and a closed position to prevent flow of product through said passage, said valve body constructed of a stiff yet resiliently bendable material and having an ear projecting radially outwardly and received in said slot during use to define a stop member for limiting movement of said valve body within said sleeve between the open and closed positions, said valve body rotatable within said sleeve with said ear configured such that, upon rotation, said ear will act against said guide member to deform said valve body and become disengaged from the slot thereby to allow removal of said valve body from said sleeve upon longitudinal movement of said valve body relative to said sleeve.

5. The closure of claim 1, wherein said valve body includes a pair of ears disposed on opposite sides of said valve body, and wherein said sleeve includes a pair of guide members defining a pair of oppositely disposed slots each sized to respectively engage one of said ears to define and limit the longitudinal movement of said valve body between said open and closed positions, each of said ears configured to act against a respective said guide member upon rotation of said valve body to deform said valve body

and become disengaged from a respective said slot to allow removal of said valve body from said sleeve upon longitudinal movement of said valve body relative to said sleeve.

7. The closure of claim 1, wherein said cap member further includes a central post extending axially along of said sleeve, and wherein said valve body includes a central cavity and a closed outer end having an aperture therein, said valve body being mountable for longitudinal movement along said post, said post being engaged within said aperture when said valve body is in said closed position and disengaged with said aperture when said valve body is in said open position.

9. The closure of claim 7, wherein said deformable valve body includes an open inner end positioned within said sleeve and communicating with the interior of said container to enable said valve body to be radially outwardly deformed by internal pressure within said container to increase the sealing capacity of said valve body in conjunction with increases in the internal pressure of said container.